BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Suzanne Marie Capellini

For Review of Disciplinary Action Taken by

FINRA

File No. 3-22284

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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MISCELLANEOUS

I. INTRODUCTION

Over a two-and-a-half-year period, Suzanne Marie Capellini, a compliance professional with decades of experience, served as the anti-money laundering compliance officer ("AMLCO") for First Manhattan Co. ("FMC"). During that same period, she acted as the registered representative for accounts controlled by her husband, whose primary activity was frequent deposits of physical certificates of low-priced securities ("LPS"), followed by liquidations and transfers of proceeds out of the accounts. While her husband's trading raised abundant red flags of suspicious activity, Capellini failed to detect and investigate any of them, and his trading continued unchecked. That trading generated almost $400,000 in profits, which Capellini testified benefited her household.

Capellini failed to ensure that FMC's anti-money laundering ("AML") procedures were tailored to address LPS trading. Those procedures contained no guidance about monitoring LPS transactions for red flags. While Capellini was provided with FINRA guidance about AML monitoring, and subsequently participated in revising the firm's AML procedures, there is no evidence she made any effort to incorporate FINRA's guidance.

When FINRA issued investigative requests about the trading in her husband's account, including for the firm's due diligence concerning his deposits of certain LPS, Capellini obtained documents from him that she produced to FINRA. Capellini produced these documents without disclosing to FINRA their origin, thereby creating the false impression that FMC's due diligence was more robust than it was. In one instance, Capellini altered an SEC filing to conceal that she downloaded it the same day she responded to FINRA's request and that the documents she produced did not come from the firm's due diligence files.

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Unable to controvert the evidence demonstrating her violations of FINRA rules, Capellini dedicates most of her brief to arguing that FINRA's procedures are improper, including that the Commission should adopt a novel reading of FINRA's jurisdiction rules to find that this disciplinary action was untimely. The record is clear, however, that the complaint was timely filed within two years of the termination of Capellini's FINRA registration.

Capellini also questions the constitutionality of FINRA's disciplinary process. Capellini, however, fails to address controlling legal precedent that establishes FINRA is not the Government for purposes of Article II of the Constitution and not a state actor such that the Seventh Amendment or other constitutional provisions apply to it. Nor has Capellini established that FINRA's disciplinary action violated the private nondelegation doctrine.

The record supports fully FINRA's findings of violations and the sanctions it imposed. Capellini's attacks on FINRA's proceedings are meritless. The Commission should therefore sustain FINRA's findings and the sanctions it imposed.

II. FACTUAL BACKGROUND

A. Suzanne Marie Capellini

Capellini joined the industry in 1979. RP 2344-45.[1] Capellini joined FMC in 1985 as compliance director, and she remained associated with the firm until she was dismissed in May 2020. RP 1103 (Stip. Nos. 1-2[2]), 1104 (Stip. No. 5), 2345, 6480.

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[1] "RP __" refers to the page number in the certified record filed by FINRA on November 12, 2024. "Br. at __" refers to Capellini's January 31, 2025 brief in support of her application for review.

[2] "Stip. No. __" refers to the parties' January 13, 2023 Joint Stipulations. RP 1103-06.

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Capellini was responsible for the day-to-day administration of compliance at FMC. RP 1530. She was also designated as the person responsible for responding to requests for information from regulators, reviewing activity in LPS and sales of control or restricted stocks, and supervising transactions in penny stocks.[3] RP 1530, 6205, 6217, 6287, 6289-90, 6295-98, 6302-05, 6316.

In January 2018, Capellini became FMC's AMLCO. RP 1103-04 (Stip. Nos. 4, 5), 61205. Capellini remained AMLCO until she was dismissed by the firm in May 2020. RP 1104 (Stip. No. 5).

B. Capellini's Husband and Other FMC Customers Trade LPS

FMC's primary business was providing investment advisory services to high-net-worth individuals who made long-term investments in value-oriented stocks. RP 1629, 1631. Capellini's husband, Roger Bendelac, and other FMC customers also traded LPS. From January 2018 through May 2020, 1,575 FMC customers engaged in 5,658 transactions in which approximately 102 million LPS shares were traded. RP 3409. The dollar amount of this trading was approximately $112.2 million. *Id.* During the same period, 24 FMC customers made 91 deposits of approximately 84 million LPS shares that were followed by sales of those shares yielding proceeds of more than $1.9 million. *Id.* Forty-five deposits were in accounts controlled by Bendelac and totaled 16,565,203 shares. RP 3405, 3407. Proceeds from Bendelac's sales of LPS in this period totaled $397,191. RP 3405.

[3] LPS include "microcap stocks" and "penny stocks." LPS often trade in the over-the-counter markets. *See FINRA Regulatory Notice 21-03,* 2021 FINRA LEXIS 2 (Feb. 2021).

C. FMC's AML Procedures When Capellini Becomes AMLCO

When Capellini became AMLCO, FMC's AML procedures provided that, "[w]hen an employee of the firm detects any red flag, he or she will investigate further under the direction of the [AMLCOs]." RP 6125, 6139. Such an investigation could "include gathering additional information internally or from third-party sources, contacting the government, freezing the account, or filing a Form SAR." *Id.* The procedures did not include any guidance, however, on how to monitor for suspicious activity involving LPS or the steps that should be taken when red flags were detected.

In September 2013, FMC's clearing firm, Pershing, contacted FMC with concerns about an account controlled by Bendelac, explaining that the account raised "red flags of receiving blocks of a [LPS], liquidating and sending the funds out of the account." RP 3913-15. Prompted by Pershing, FMC developed a form to be completed when certain LPS were deposited or transferred into FMC accounts (the "Preclearance Form"). RP 1611, 6181-82. Capellini helped develop the Preclearance Form and circulated it to FMC's employees. RP 2400. Capellini wrote that the firm "has regulatory obligations to comply with federal securities laws and FINRA regulations regarding unregistered resales of restricted securities." RP 6181. Thus, "[f]or customers who make physical deposits of certificates or transfer in large blocks of securities, the firm is *required* to inquire as to the source of the securities." *Id.* (Emphasis added.) The Preclearance Form was intended to assist in meeting these regulatory obligations. *Id.*

Registered representatives were required to complete the Preclearance Form "prior to the deposit or sale/transfer of certificates representing a large block of thinly traded [securities] or [LPS]." RP 6182. The Preclearance From required disclosure of the "specific details as to how and when [the] securities were acquired" and asked representatives to attach supporting

documentation or explain why none was attached. *Id.* When the shares were acquired in a sale, the Preclearance Form asked the representative to describe the relationship of the seller to the issuer. *Id*.

D. FMC Revises Its AML Procedures but Fails to Incorporate FINRA Guidance

On May 22, 2019, Capellini's supervisor forwarded to Capellini and others an email titled "Alert: FINRA Issues Guidance on Anti-Money Laundering Compliance Obligations." RP 4041-55. The email explained that FINRA had issued Regulatory Notice 19-18, a copy of which was attached, "provid[ing] guidance on reporting and monitoring suspicious activities under a member firm's [AML] compliance program." RP 4042, 4044-55. Regulatory Notice 19-18 reminded FINRA members of their obligations to establish and implement policies to detect and trigger the reporting of suspicious activities and provided dozens of "examples of . . . money laundering red flags for firms to consider incorporating into their AML programs," including red flags associated with the deposit and trading of LPS. RP 4045.

In October 2019, Capellini revised the firm's AML procedures with input from FMC's Chief Compliance Officer and the alternate AMLCO. RP 1782-83, 6153. Capellini, however, did not add any procedures related to the deposit and trading of LPS and did not incorporate any of the red flags discussed in Regulatory Notice 19-18. RP 1756, 6153-79. Capellini also did not include in the revised procedures any guidance about monitoring LPS for suspicious activity or mention the Preclearance Form or provide guidance for its use. RP 1791-93. Finally, the revised AML procedures did not contain any information or guidance about the firm's review or use of exception reports to monitor LPS activity.[4] RP 1796.

[4] Capellini was responsible for reviewing exceptions reports, including an LPS turnover report provided by Pershing. RP 1796, 2391. The LPS turnover report reported an exception

[Footnote continued on next page]

E. Capellini's Husband's LPS Activity at FMC Increases after She Becomes AMLCO

Capellini's husband controlled four FMC accounts in which he traded LPS. RP 1104 (Stip. No. 11), 3405. Capellini was the registered representative for each of these accounts. RP 1533.

Bendelac primarily deposited and liquidated LPS in his FMC accounts. Despite Capellini's claims otherwise, the frequency of Bendelac's deposits of LPS—instances in which the firm was required to perform due diligence—increased after Capellini became AMLCO. In 2018, Bendelac made 22 LPS deposits, more than the his total deposits during the six previous years. RP at 3407. From January 2019 through April of 2020, Bendelac made 23 additional LPS deposits. *Id*. Moreover, during the two-and-a-half-year period Capellini was the firm's AMLCO, Bendelac's LPS sales almost doubled to 204.[5] *Id*.

F. Bendelac's LPS Activity Raises Numerous Red Flags

During the relevant period, the majority of Bendelac's LPS activity was in the account of Aleutian Equity Holdings, an entity Bendelac controlled. RP 3405. Bendelac's trading in the Aleutian account raised numerous red flags that should have been investigated. From January 2018 through April 2020, Bendelac deposited 908,840 shares of LPS in the Aleutian account and generated $365,706 in proceeds through 196 LPS sales. RP 3405. Most of these deposits were of physical stock certificates, most of which had been issued in the 30 days prior to the deposit.

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when an account received 50,000 or more LPS shares and then sold all or part of the shares within 30 calendar days. RP 1805-06. Capellini testified that she would log in to a Pershing computer system to review the reports on the screen and would print and initial the report's cover page to document her review. RP 2500-02. Sometimes Capellini printed the cover page to document her review immediately; at other times, she printed cover pages in a batch later. RP 2500-01.

[5] By comparison, during the six-year period from 2012 through 2017, Bendelac engaged in only 107 LPS sales transactions. RP 3407.

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RP 3411. For all but one certificate deposit, the issuer was the subject of a "going-concern" opinion—an auditors' opinion raising doubts about the issuer's ability to continue as a going concern. *Id*. Moreover, several of the issuers were shell companies, had changed their names prior to the deposit, or had owners with regulatory history or who were associated with multiple LPS issuers. *Id*.

Bendelac's initial sales of LPS deposited into the Aleutian account raised additional red flags. In many cases, the sales constituted a substantial portion or all the daily market volume for the stock. RP 3413. Moreover, in most cases, Bendelac's first sale was through a limit order that exceeded by substantial amounts the price Aleutian paid for the shares and the best bid or ask for the LPS prior to the order, and the sale was executed at the requested limit price. *Id*.

1. Bendelac's Deposits and Sales of Rivex Raise Red Flags

On August 9, 2018, Bendelac deposited 3,000 shares of Rivex Technology Corp. into the Aleutian account by means of a physical stock certificate issued the month before. RP 3411, 3419, 4582. Capellini completed and signed the Preclearance Form for her husband's Rivex deposit. RP 3693.

Where the Preclearance Form asked her to provide "specific details as to how and when" the Rivex shares were acquired by Aleutian, Capellini wrote "see attached." *Id*. (Emphasis in original.) Capellini attached a copy of the stock certificate and a purchase agreement representing that Aleutian purchased the Rivex shares from an individual for 20 cents per share. RP 3694-96. Capellini did not include any information about the relationship of the seller to the issuer in the portion of the Preclearance Form that asked for this information. *Id*. The purchase agreement and stock certificate attached to the Preclearance Form represent the only due diligence Capellini performed in connection with the Rivex deposit.

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In SEC filings for the period ending March 31, 2018, Rivex described its business as "development of and sale of mobile games," disclosed that it had "not yet established an ongoing source of revenues sufficient to cover its operating costs," and it warned that there was "substantial doubt about [its] ability to continue as a going concern." RP 3419. In SEC filings for the quarter ending June 30, 2018, Rivex disclosed that it had no revenue and only $767 in cash. *Id*.

On August 13, 2018, four days after the deposit, Bendelac placed a limit order to sell Rivex at a limit price of $5.00. RP 3413. The next day, Bendelac sold 100 shares of Rivex at the limit order price of $5.00 per share. RP 3419. Aleutian's sale was the first public sale of Rivex ever, and its trade constituted 50 percent of Rivex's daily trading volume. RP 3413, 3419.

From August 2018 through November 2019, Bendelac engaged in six more sales of Rivex stock and wired proceeds out of the account. RP 3419. In total, Bendelac sold 2,800 Rivex shares, generating total proceeds of $10,481.33. *Id*. Capellini did not do any due diligence with respect to these sales even though the Preclearance Form itself stated that it was supposed to be completed for sales and transfers of LPS. RP 3693.

2. Bendelac's Deposits and Sales of Token Raise Red Flags

On September 21, 2018, Bendelac deposited 300,000 shares of Token Communities, LTD in the Aleutian account by means of a physical stock certificate that was issued on April 2, 2018. RP 3425. Capellini completed a Preclearance Form for the deposit. RP 4249-54. In the space calling for specific details about how and when the securities were acquired by Aleutian, Capellini wrote "see attached," and attached a copy of the stock certificate and an attorney opinion. *Id*. The attorney opinion represented that Aleutian had purchased the Token shares in a private transaction for 25 cents per share. RP 4252. No details were provided about the identity

of the seller or the date of the transfer. RP 4252-54. The Preclearance Form and attachments are the only due diligence Capellini performed in connection with the deposit. Capellini did not obtain or include any information about the relationship of the seller to the issuer. RP 4249, 4525.

In SEC filings, Token disclosed that, from 2014 through 2018, it changed its name and business line twice. RP 3425. As of March 31, 2018, Token had no assets or revenue in the prior nine months and a previous financial statement contained a going concern opinion. *Id*.

On September 26, 2018, Bendelac placed a limit order to sell 100 shares of Token for a limit price of $1.30. RP 3413. Aleutian sold 100 shares of Token that same day for $1.40 per share. *Id*. Aleutian's sale was the first public sale of Token and constituted 100 percent of its daily trading volume. *Id*.

From September 2018 through March 2020, Bendelac engaged in approximately 30 additional sales of Token and wired out proceeds. RP 3425-28. His sales of Token generated total proceeds of $96,820.64. RP 3425-28. Capellini did not complete a Preclearance Form or do any due diligence with respect to these sales.

3. Bendelac's Deposits and Sales of Lazex Raise Red Flags

On May 13, 2019, Bendelac deposited 2,000 shares of Lazex Inc. in the Aleutian account by means of a physical stock certificate issued just three weeks earlier. RP 3413, 3421, 4479. There was no Preclearance Form for Lazex in FMC's files and no evidence that Capellini performed any due diligence for this deposit. RP 3415. Aleutian purchased its Lazex shares from an individual residing abroad for $1.00 per share. RP 3721. For the quarter ending January 31, 2019, Lazex disclosed that it had no revenue in the prior nine months, $4592 in cash, and that there was substantial doubt about its ability to continue as a going concern. *Id*.

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On May 16, 2019, Bendelac placed a limit order to sell Lazex for a limit price of $2.00. RP 5606. The prior best bid for Lazex was five cents per share. RP 3413. Eleven days after the deposit, and eight days after placing the limit order, Aleutian sold 100 Lazex shares for $2.00 per share. RP 3413, 3421, 5608. The sale price represented an approximately 3,900 percent increase over the prior best bid of five cents and the sale constituted 100 percent of Lazex's daily trading volume that day. RP 3413, 3421.

On June 25 and 26, 2019, Bendelac sold an additional 100 Lazex shares for $2.00 per share and 300 shares for $2.1833, respectively. RP 3421, 5606, 5608. On both days, the sales constituted 100 percent of Lazex's daily trading volume. RP 3421. Bendelac wired out proceeds from the sales. *Id*. Bendelac ultimately sold a total of 500 Lazex shares for total proceeds of $1,034.70. *Id*. There is no evidence that Capellini conducted any due diligence for these sales.

4. Bendelac's Deposits and Sales of Remaro Raise Red Flags

On August 5, 2019, Bendelac deposited 2,000 Remaro Group Corporation shares into the Aleutian account by means of a physical stock certificate issued just six days earlier. RP 3413, 3423, 3700, 4442. Remaro disclosed that, as of the quarter ending April 30, 2019, it had no revenue in the prior nine months, $242 in cash, and there was substantial doubt about its ability to continue as a going concern. RP 3423.

Two days after the deposit, Bendelac placed a limit order for a limit price of $2.00 per share. RP 3413. The prior best bid for Remaro was one cent per share. *Id*. The next day, Aleutian sold 100 Remaro shares for $2.00 per share, approximately a 19,000 percent increase over the prior best bid. RP 3413, 3423, 4442. This was the first public sale of Remaro stock and represented 50 percent of Remaro's daily trading volume that day. RP 3411, 3413, 3423.

Capellini did not complete a Preclearance Form for Bendelac's Remaro deposit until August 9, 2019, four days after the deposit and one day after the first sale. RP 3697. Capellini wrote "see attached" in the space calling for specific details about how and when the securities were acquired, and she attached a copy of the stock certificate and a private share purchase agreement. RP 3697-3701. The purchase agreement represented that Aleutian purchased Remaro 12 days before the deposit from an individual residing abroad for $1.00 per share. RP 3698. Capellini did not include any information about the relationship of the seller to the issuer.

Bendelac made two additional sales of Remaro and wired out proceeds. RP 3423. Bendelac sold a total of 500 Remaro shares, generating total proceeds of $1,277.46. Capellini did not complete Preclearance Forms for any of the Remaro sales.

G. Capellini Obtains Documents from Bendelac and Produces Them to FINRA

Beginning in November 2019, FINRA's Office of Fraud Detection and Market Intelligence ("OFDMI") began investigating some of Bendelac's trading in the Aleutian account. OFDMI issued FINRA Rule 8210 requests for documents and information about Aleutian's trading in Rivex, Lazex, and Remaro.[6] The requests were sent to Capellini, FMC's designated point of contact for such requests, and she prepared the responses on behalf of the firm.

1. OFDMI Requests Documents Related to Bendelac's Lazex Trading

On December 4, 2019, OFDMI sent a Rule 8210 request asking FMC to provide documents and information concerning Bendelac's activity in Lazex in the Aleutian account (the "Lazex Request"). RP 1409, 3491, 5599-5601. Among other things, the Lazex Request asked

[6] The first Rule 8210 request concerned Rivex (the "Rivex Request"). Because the NAC dismissed the findings of violation with respect to this request, we omit a discussion of the facts concerning this request here. A description of those facts can be found in the NAC's decision. RP 7003-04.

for:

> [c]opies of all due diligence inquiries that the firm made to determine the free trading basis of the [Lazex] shares deposited by, or transferred into, the [Aleutian account]. This should include, if applicable, copies of stock certificates, attorney opinion letters, and any other documents detailing the origin of the shares. RP 3491, 5599.

Capellini told Bendelac about the Lazex Request. The next day he sent to Capellini's personal email account three emails with attachments, which Capellini forwarded to her FMC email. RP 1547-48, 2703, 3715-29. The attachments included: (1) an attorney opinion letter opining on the free-trading status of the Lazex shares; (2) a copy of the subscription agreement for the seller from which Aleutian purchased the Lazex shares; and (3) a copy of a second attorney opinion letter with an attached shareholder list. RP 3715-29. Capellini did not have these documents prior to receiving them from Bendelac on December 5, 2019—months after his deposit of Lazex—and they were not in FMC's due diligence files. RP 1553-55, 1557-58, 1559-62, 2713, 2717. Indeed, Capellini never completed a Preclearance Form or otherwise conducted due diligence at the time of the Lazex deposit.

On December 9, 2019, Capellini submitted FMC's response to the Lazex Request. RP 5604-05. In response to FINRA's request for copies of the firm's due diligence, Capellini wrote that responsive documents were "[a]attached as Exhibit D." RP 5605. Exhibit D included the documents Bendelac provided to Capellini after she received the Lazex Request. RP 1553-55, 1557-58, 1559-62, 5601, 5779-92. Capellini did not disclose to FINRA that the documents she produced were obtained from her husband just days earlier and were not part of the firm's due diligence in connection with the Lazex deposit.

2. OFDMI Requests Documents Related to Bendelac's Remaro Trading

On January 24, 2020, OFDMI sent a Rule 8210 request asking FMC to provide documents and information concerning Bendelac's Remaro activity in the Aleutian account (the "Remaro Request"). RP 1419-21, 3493, 5793-94. The Remaro Request contained a request for copies of the firm's due diligence that was identical to that in the Lazex Request. RP 3493, 3496-97, 5793.

Capellini told Bendelac about the Remaro Request and, on January 26, 2020, an attorney connected to Bendelac sent an email to Capellini's personal email address attaching his letter opining on the free-trading status of the Remaro shares purchased by Aleutian. RP 2730, 3731-33. The opinion letter referred to five exhibits, but the email was missing one exhibit—a Remaro Amended S-1 filing dated April 17, 2017. RP 2742-43, 3731-44. Capellini forwarded the attorney's email to her FMC email on January 27, 2020, at 10:09 a.m. RP 3731.

At 11:06 a.m. that day, Capellini scanned the documents she intended to submit in response to the Remaro Request. These included the documents she had received from the attorney and a copy of Remaro's Amended S-1—the attachment that had been missing from the attorney's email to Capellini. RP 2746, 3761-3811. Each page of the Amended S-1 included a footer that indicated that it had been downloaded from the SEC's Edgar system that day. RP 2747-48, 3761-3811. Capellini sent the scanned documents as a .pdf file to her FMC email address. RP 3745-3816.

At 3:28 p.m., Capellini rescanned these same documents and send them as a .pdf file to her FMC email address. RP 3817-3888. The only difference between this copy of the documents and the copy Capellini scanned earlier was that the Remaro Amended S-1 did not

contain the footer indicating that it had been downloaded from Edgar that day. RP 2751-52, 3817-3888.

Approximately 30 minutes later, Capellini uploaded the documents and FMC's written response to the Remaro Request through FINRA's Gateway system. RP 5795. FMC's written response, which Capellini drafted, indicated that documents responsive to the request for the firm's due diligence concerning the Remaro deposit were "[a]ttached as Exhibit 4." RP 5797. Capellini named that file "Exhibit 4 – Due Diligence." RP 1426, 5795. The copy of the Remaro Amended Form S-1 that Capellini submitted to FINRA was the one without the footer. RP 6069-6118. Capellini did not disclose to FINRA that none of these documents were from FMC's files but rather had been received from the attorney the previous day. RP 1563, 1569-71, 1580.

H. FMC Dismisses Capellini

In April 2020, prompted by an SEC inquiry, FMC started an investigation into the firm's responses to FINRA's Rivex, Lazex, and Remaro Requests. RP 1530-31, 1534. The firm reviewed documents, interviewed employees, and searched email. RP 1535, 1539. On April 29, 2020, FMC representatives interviewed Capellini about the responses she prepared and submitted to FINRA on behalf of the firm. RP 1581-83. That same day, FMC placed Capellini on administrative leave and removed her access to the office and firm systems. RP 1583. That evening, FMC's Chief Legal Officer searched Capellini's office and located files related to the Rivex, Lazex, and Remaro Requests. RP 1584-87.

On or about May 8, 2020, FMC and its outside counsel spoke to FINRA staff about its investigation and told FINRA it had fired Capellini. RP 1617-23. That same day, FMC sent an email inviting FINRA staff and other regulators to attend a Webex virtual meeting to report the findings of the firm's investigation. RP 1597-98, 5309. During the May 11, 2020 WebEx, FMC

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reported that Capellini had submitted to FINRA an altered document and inaccurate responses to FINRA's Rule 8210 requests for the firm's due diligence related to the Rivex, Lazex, and Remaro deposits. RP 1432, 1434-35. FMC reported that it had discovered that Capellini submitted to FINRA documents in response to requests for the firm's due diligence that were not in the firm's files prior to FINRA's requests and thus not actually part of the due diligence the firm had conducted concerning these deposits. RP 1541-42, 1548-50, 1552-55, 1557-63, 1569-71, 1580.

The files located in Capellini's office contained the hard copies of the responses she submitted to FINRA in response to the Rivex, Lazex, and Remaro Requests. In the Remaro Request file, the firm found a hard copy of the Remaro Amended S-1 that Capellini provided to FINRA. RP 1437, 3495-3570. The bottom inch of each page—the portion which would have contained the footer—had been cut off. RP 1436, 3516-3565. FMC subsequently provided to FINRA relevant documents and information, including this Remaro file. RP 1433-34, 1439-51, 3572-3692, 5309.

On May 8, 2020, FMC dismissed Capellini from employment. RP 1596-97. On June 5, 2020, FMC filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") that disclosed the firm discharged Capellini because of a "[l]oss of trust and confidence regarding compliance responsibilities, including the responsibility to submit accurate responses to FINRA." RP 1104 (Stip. No. 10), 6477. 6482.

III. PROCEDURAL HISTORY

On June 1, 2022, FINRA's Department of Enforcement filed a two-cause complaint that alleged Capellini had violated FINRA Rules 3310, 8210 and 2010. RP 1-27. On July 14, 2023,

after conducting a five-day hearing, the Hearing Panel issued a decision. RP 1297-3404, 6613-62. The Hearing Panel majority found that Capellini violated FINRA Rules 8210 and 2010 by providing false and misleading responses to the Rivex, Lazex, and Remaro Requests and an altered document in response to the Remaro Request and imposed a bar for these violations. RP 6648-52, 6659-60. The Hearing Panel also found that Capellini violated FINRA Rules 3310 and 2010 by failing to establish and implement an AML program reasonably designed to cause the detection and reporting of suspicious LPS activity. RP 6641-48. The Hearing Panel did not impose a sanction for Capellini's AML violations, but it concluded that it would have, absent the bar for her other misconduct, imposed a $25,000 fine and two-year suspension. RP 6655-58.

On appeal, the National Adjudicatory Council ("NAC"), modified the Hearing Panel's findings of violation and the sanctions it imposed. RP 6995-7026. In a decision issued on October 3, 2024, the NAC found that Capellini violated FINRA Rule 8210 and 2010 by providing false and misleading responses to the Lazex and Remaro Requests, and an altered document in response to the Remaro Request. RP 7017-20. The NAC dismissed, however, the Hearing Panel's findings with respect to the Rivex Request. RP 7020. The NAC imposed a bar for Capellini's Rule 8210 violations. RP 7023-26. The NAC also found that Capellini violated FINRA Rules 3310 and 2010 by failing to establish and implement a reasonably designed AML program for the deposit and trading of LPS, and by failing to detect and investigate red flags of suspicious activity related to LPS. RP 7010-17. With respect to this misconduct, however, the NAC found that the Hearing Panel's sanctions did not "adequately reflect the egregiousness of Capellini's misconduct," and the NAC therefore imposed a second, independent bar. RP 7021- 23.

IV. ARGUMENT

The record conclusively demonstrates that Capellini engaged in the misconduct FINRA found and that this misconduct violated FINRA rules, which were applied in a manner consistent with the Exchange Act. *See* 15 U.S.C. § 78s(e)(1); *see also Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *8 (Oct. 31, 2018). Capellini failed to establish and implement an AML program tailored to customers' LPS trading and failed to detect and investigate numerous reg flags in her husband's LPS activity, in violation of FINRA Rule 3310. Capellini also provided false and misleading responses and an altered documents in response to FINRA Rule 8210 requests. The Commission should sustain FINRA's findings.

A. Capellini Failed to Establish and Implement an Adequate AML Program

The record demonstrates that Capellini violated FINRA Rules 3310 and 2010 by failing to establish and implement an AML program reasonably designed for the deposit and trading of LPS and, as a result, failing to detect and investigate numerous red flags of suspicious activity in her husband's LPS activity.

1. Capellini Failed to Establish and Implement Adequate AML Procedures for LPS

FINRA Rule 3310 sets forth the minimum requirements for FINRA members' AML compliance programs. The rule requires members to "develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act." This includes "establish[ing] and implement[ing] policies and procedures that can be reasonably expected to detect and cause the

reporting" of suspicious transactions.[7] FINRA Rule 3310(a). Moreover, FINRA Rule 3310(d) requires members to "designate and identify to FINRA . . . an individual or individuals responsible for implementing and monitoring the day-to-day operations and internal controls of the [AML] program." This designated person—the AMLCO—should have "full responsibility and authority to make and enforce the firm's policies and procedures related to money laundering" and "the authority, knowledge, and training to carry out the duties and responsibilities of his or her position." *NASD Regulatory Notice 02-21*, 2002 NASD LEXIS 24, at *49 (Apr. 2002).

Firms have a duty to detect and investigate red flags indicating potential money laundering. *Id.* at *37-42. FINRA has provided guidance that includes a non-exhaustive list of red flags of suspicious activity. Such red flags may include: (1) a pattern of depositing physical share certificates and then immediately selling the shares and wiring proceeds out of the account; (2) depositing physical share certificates that were recently issued, issued by a shell company, or issued by a company with recent name changes; (3) when combined with other red flags, trading in certain types of securities, like penny stocks, that have been used in connection with fraudulent schemes and money laundering activity; and (4) a customer's activity represents a significant proportion of the daily trading volume in a thinly traded stock or LPS. *See FINRA Regulatory Notice 19-18*, 2019 FINRA LEXIS 21, at *11-14 (May 2019).

As AMLCO, Capellini was responsible for FMC's AML procedures, but she did not revise FMC's deficient procedures until almost 10 months after she became AMLCO and, when

[7] FINRA Rule 3310 applies to persons associated with a member through FINRA Rule 0140(a) which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member" under FINRA rules. Additionally, a violation of FINRA Rule 3310 is also a violation of FINRA Rule 2010. *See Meyers Assoc. L.P.*, Exchange Act Release No. 86193, 2019 SEC LEXIS 1626 at *23 (June 24, 2019).

she did revise the procedures, she failed to tailor them to address the serious risks posed by the LPS trading of the firm's customers. *See Wilson-Davis & Co.*, Exchange Act Release No. 99248, 2023 SEC LEXIS 3658, at *37-38 (Dec. 28, 2023) (finding that the firm and its AMLCO violated FINRA Rule 3310 because the AMLCO failed to establish procedures "tailored to the AML risks presented by the firm's penny stock liquidation and trading business"). The procedures did not address how to monitor the trading of LPS at all. While Capellini had received a copy of FINRA Regulatory Notice 19-18, she did not incorporate any of the red flags listed in the notice when she revised FMC's AML procedures just a few months later. RP 4041-55. Nor did she include in the revised procedures any explanation of when and how to use the firm's primary due diligence tool—the Preclearance Form. Indeed, both before and after Capellini revised them, FMC's AML procedures did not mention the Preclearance Form at all. Finally, the AML procedures contained no information about how the firm should use exception reports to monitor for suspicious activity, did not specify how frequently exception reports were to be reviewed or by whom, what review would be conducted, or how it would be documented. *See Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at *20-21 (Apr. 2, 2018) (finding AML policies deficient when the firm pointed to exception reports but did not explain how the firm used the reports to monitor for suspicious activity).

2. Capellini Failed to Detect and Investigate Red Flags

FMC's deficient AML procedures and Capellini's failure to properly use even the few due diligence tools FMC did have, resulted in Capellini's failure to detect and investigate numerous red flags. For example, Capellini's use of the Preclearance Form was incomplete and inconsistent. The firm's files did not include a Preclearance Form for 15 of the 38 LPS deposits made by Bendelac, and in two cases the Preclearance Form was not completed until after the

LPS had been accepted for deposit. RP 3415. Even when Capellini completed the Preclearance Form for deposits, she included minimal information, and did not include information about the relationship of the seller to the issuer as required by the Preclearance Form. Moreover, Capellini did not complete Preclearance Forms or do any due diligence for Bendelac's LPS sales or transfers. In fact, Capellini testified that she did not know that FMC was responsible for monitoring sales of LPS. RP 2423-24.

During the relevant period, Bendelac made 38 LPS deposits in the Aleutian account, engaged in over 200 LPS sales, and wired out more than $360,000 in proceeds. RP 3405, 3415. This pattern of depositing LPS, selling them, and then wiring out the proceeds was itself a red flag that should have prompted an investigation of Bendelac's LPS activity. RP 1752. *See FINRA Regulatory Notice 19-18*, 2019 FINRA LEXIS 21, at *11-12. Bendelac often deposited LPS using physical certificates that had been issued within the 30 days prior to the deposit. RP 3411. Many of the LPS issuers were the subject of "going concern" opinions, had changed their names or business lines, and had limited or no revenue or assets. *Id*. Bendelac's sales often constituted the first public sale of the LPS, were priced significantly higher than the prior best bid, and represented all or a substantial portion of the LPS's daily market volume for the day of Bendelac's trade. RP 3411, 3413.

Bendelac deposited Rivex through a physical stock certificate issued just 21 days earlier. RP 3411, 3419, 4582. Rivex was the subject of a going concern opinion and had virtually no revenue or assets. RP 3419. Five days after he deposited Rivex, Bendelac sold a portion of his shares for $5 per share, a substantial increase from the 20 cents per share he paid just a month earlier. RP 3413, 3419. This sale was Rivex's first public sale ever and represented 50 percent of Rivex's daily trading volume. *Id.*

Bendelac's deposit and sales of Token raised similar red flags. Bendelac deposited Token through a physical stock certificate issued approximately five months before the deposit. RP 3425. From 2014, Token changed its name and business line twice. *Id.* Token had a going concern opinion and no revenue or assets in the months prior to Aleutian's purchase of the shares. *Id.* A few days after the deposit, Bendelac sold blocks of Token for $1.30 and $1.40 per share, significantly more than 25 cents Aleutian paid. RP 3413. Aleutian's sales were the first public sales of Token ever and constituted 100 percent of the daily trading volume. *Id.* Bendelac ultimately engaged in approximately 30 sales of Token in the Aleutian account, generating total proceeds of almost $100,000. RP 3425-28.

Bendelac deposited Lazex through a physical stock certificate issued 20 days earlier. RP 3413, 3421, 4479. Lazex had no revenue, limited assets, and a going concern opinion. RP 3721. Eleven days after the deposit, Bendelac sold a block of Lazex shares for $2.00 per share, a 3,900 percent increase from the stock's prior best bid of five cents. RP 3413, 3421, 5608. The sale constituted 100 percent of the daily trading volume for Lazex, as did subsequent sales by Bendelac. RP 3413, 3421.

Bendelac deposited Remaro through a physical stock certificate issued six days before the deposit. RP 3413, 3423, 3700, 4442. Remaro had a going concern opinion, no revenue, and virtually no assets. RP 3423. Aleutian purchased the shares for $1 per share. RP 3698. Three days after the deposit, Bendelac sold a block of Remaro for $2 per share, double the $1 per share Aleutian purportedly paid for the shares 12 days earlier, and 19,000 percent more than Remaro's prior best bid of one cent per share. RP 3413, 3423, 4442. This was the first public sale of Remaro and represented 50 percent of the stock's daily market volume. RP 3411, 3413, 3423.

Capellini failed to detect and investigate these red flags. Capellini did nothing to learn about the issuers, including their business, assets, and revenue. RP 2499. When Bendelac purchased the shares, Capellini asked no questions about the seller's relationship to the issuer even though the Preclearance Form required this information. RP 3693, 3697, 4249. Capellini did not obtain evidence that Bendelac had actually paid for the shares. RP 2419, 2474, 2478. When Bendelac's trading appeared on low-priced securities turnover exception reports, Capellini did nothing to investigate. *See Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *34-36 (July 17, 2019) (finding that failures to detect or investigate red flags violated FINRA Rule 3310).

On appeal, Capellini does not challenge FINRA's findings of AML violations. Instead, her primary defense is that she simply followed the procedures that were in place long before she became AMLCO, and she blames others for the firm's deficiencies. Br. at 28. Capellini's attempts to shift blame, however, do not excuse her violations.

When she became AMLCO, Capellini was responsible for ensuring that FMC's AML procedures were appropriately tailored and implemented. *See* FINRA Rule 3310(d). Yet, she waited more than nine months to revise FMC's deficient AML procedures. RP 6153-79. *See Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *31 (Dec. 19, 2008) (finding that respondent violated the predecessor to Rule 3310 because the firm's deficient supervisory system required that he "act sooner" to correct the deficiencies "especially in light of red flags"). Moreover, even in the revised procedures, Capellini failed to incorporate the guidance in FINRA Regulatory Notice 19-18, even though a copy of the notice was sent to her less than five months earlier. RP 4041-55.

Capellini blames others at FMC, Pershing, the FMC's outside auditors, and even FINRA and the SEC, for not identifying the firm's AML deficiencies. While others at the firm may also bear responsibility for its AML failures, this does not excuse Capellini's violations. *See Edward Beyn*, Exchange Act Release No. 97325, 2023 SEC LEXIS 980, at *19-20 (Apr. 19, 2023) (rejecting respondent's attempt to shift blame for his misconduct to his firm and supervisors and explaining that "[t]he fact that others also might have been remiss in their duties does not mitigate [the respondent's] responsibility"), *aff'd, Beyn v. SEC*, No. Civ. 23-6526-ag, 23-6653-ag, 2025 U.S. App. LEXIS 81, (2nd Cir. Jan. 3, 2025). Nor can Capellini shift the responsibility for AML compliance at FMC to the firm's clearing firm or auditors. *See Dep't of Enf't v. C.L. King Assoc., Inc.*, Complaint No. 2014040476901, 2019 FINRA Discip. LEXIS 43, at *81-82 (FINRA NAC Oct. 2, 2019) (rejecting reliance on a third-party vendor to provide updates to the firm's procedures and finding that "it was [an AMLCO's] and the firm's responsibility, rather than a third party's, to ensure that the procedures were reasonably designed and tailored to the firm's business"); *Dep't of Enf't v. Lek Sec. Corp.*, Complaint No. 2009020941801, 2016 FINRA Discip. LEXIS 63, at *26 (FINRA NAC Oct. 11, 2016) (explaining that the firm has independent responsibilities for AML compliance and cannot rely on delegation to its clearing firm), *aff'd*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830 (Apr. 2, 2018). Capellini's attempts to blame FINRA or the SEC for failing to identify deficiencies in FMC's AML program are equally unfounded. *See Dep't of Enf't v. Pellegrino*, Complaint No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *50 n.34 (FINRA NAC Jan. 4, 2008) (stating that the Commission has repeatedly held that responsibility for compliance cannot be shifted to regulators), *aff'd*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008).

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Capellini also argues that her violations should be excused because FMC "forced" her into an "obvious" conflict by expecting her to monitor her husband's trading. Br. at 28. Capellini had decades of compliance experience and the conflict should have been as "obvious" to her as to others at FMC. But other than Capellini's unsupported claim that she once asked the firm to allow her husband to maintain his accounts outside the firm, there is no evidence that Capellini did anything to raise or address these conflicts with anyone at FMC. Significantly, Capellini did not ask FMC's alternate AMLCO to review her husband's deposits and trading. To the contrary, she chose to act as the registered representative on his accounts, putting herself in the position to be responsible for completing the Preclearance Forms and performing due diligence for his LPS trading as the AMLCO.

Finally, Capellini argues that her implementation of AML procedures was reasonable because LPS trading was a "de minimus" portion of FMC's business and there were no instances of money laundering during her tenure. Br. at 28. As the NAC correctly concluded, however, while LPS activity was a "very small portion" of FMC's business, it posed a high AML compliance risk to the firm. During the relevant period, more than 1,500 FMC customers engaged in more than 5,600 low-priced securities transactions representing more than $112 million in trading activity. RP 3409. And while Capellini claims that there were no instances of money laundering at FMC, findings of money laundering are not necessary for violations of FINRA Rule 3310. *See, e.g.*, *Meyers Assoc. L.P.*, 2019 SEC LEXIS 1626 at *46 (explaining that "there need not be an underlying AML violation" for a violation of FINRA Rule 3310); *Lek Sec. Corp.*, 2018 SEC LEXIS 830, at *29 (proving an instance of money laundering "is not an element of a violation of . . . FINRA Rule 3310(a)").

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Accordingly, the NAC correctly found Capellini violated FINRA Rules 3310 and 2010 by failing to establish and implement an adequate AML program and failing to detect and investigate red flags.

B. Capellini Provided False and Misleading Responses to FINRA Investigative Requests

The record also supports fully FINRA's findings that Capellini violated FINRA Rules 8210 and 2010 by producing documents in response to FINRA's request for the firm's Lazex and Remaro due diligence that she obtained from her husband only *after* receiving FINRA's requests. The evidence also establishes conclusively that Capellini altered a document to conceal the date it was downloaded and produced it to FINRA.

FINRA Rule 8210(a) authorizes FINRA staff to require any person subject to its jurisdiction to "provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation, complaint, examination, or proceeding." Because FINRA does not have subpoena power, it "must rely on Rule 8210 to obtain information . . . necessary to carry out its investigations and fulfill its regulatory mandate." *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009); *see also Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (Rule 8210 "is at the heart of the self-regulatory system for the securities industry"), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

Providing false or misleading information to FINRA in response to a Rule 8210 request constitutes a violation of the rule.[8] *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008). False or misleading information "can conceal

[8] A violation of Rule 8210 is also a violation Rule 2010. *See CMG Inst. Trading, LLC*, 2009 SEC LEXIS 215, at *30 n.36.

wrongdoing and thereby subvert [FINRA's] ability to perform its regulatory function and protect the public interest." *Id.* at *32.

The Lazex and Remaro Requests asked for "[c]opies of all due diligence inquiries that the firm made to determine the free trading basis" of the Lazex and Remaro shares "deposited by or transferred into" the Aleutian account. RP 3491, 3493, 3496-97, 5599, 5793. The second sentence of the Lazex and Remaro Requests explained that due diligence documents "should include, *if applicable*, copies of stock certificates, attorney opinion letters, and any other documents detailing the origin of the shares." *Id.* (emphasis added).

FMC's files contained no due diligence with respect to Bendelac's deposit and trading of Lazex in the Aleutian account. Rather than disclose this to FINRA, Capellini obtained from Bendelac two attorney opinion letters, a subscription agreement, and a shareholder list, and produced these documents to FINRA in response to the Lazex Request. Capellini did not disclose to FINRA, however, that she obtained these documents from Bendelac only *after* she received the Lazex Request. By so doing, Capellini misled FINRA investigators that these were documents from the firm's files and had been obtained as due diligence when Bendelac deposited Lazex.

When Bendelac deposited the Remaro stock, Capellini completed a Preclearance Form, albeit after the stock had been deposited and the first sale was executed. RP 3697. Capellini attached to the Preclearance Form a copy of the purchase agreement for the shares, and a copy of the stock certificate. RP 3697-3701. Capellini produced to FINRA the stock certificate and purchase agreement, but not the Preclearance Form, in response to the Remaro Request. RP 6069-6118. She also obtained additional documents from an attorney connected with Bendelac and provided these to FINRA. RP 3731-44. These documents included an attorney opinion that

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referenced four exhibits. *Id.* Capellini produced these documents in response to the Remaro Request without disclosing that they did not come from the firm's files but rather were obtained from Bendelac's attorney *after* Capellini received the Remaro Request. Capellini's response misled FINRA because it suggested that FMC's due diligence at the time of the Remaro deposit was more robust than it actually was.

Capellini also altered a document that she included in the response to the Remaro Request. When Capellini received an email from the attorney with the opinion letter, one of the referenced exhibits—the Remaro Form S-1—was not attached. *Id.* However, the response Capellini submitted to FINRA, included the Remaro S-1. RP 6069-6118. The record contains persuasive evidence that Capellini downloaded the Remaro S-1 on the same day she submitted the response, cut off the footer that indicated the date it was downloaded, and submitted this altered document to FINRA, further masking from FINRA the true extent of the firm's due diligence. *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *18n.18 (June 2, 2016) (explaining that circumstantial evidence can be more than sufficient to prove a violation of securities laws).

The record contains a trail of email supporting these findings. Capellini received the opinion letter from the attorney by email, which she forwarded from her personal email account to her FMC email account. RP 1178, 3731-33. The Remaro S-1 was referenced as an exhibit in the opinion, but not attached to the attorney's email. Capellini scanned and sent to her FMC email account a copy of her response to the Remaro Request that included the Remaro S-1 with the footer showing it was downloaded that day. RP 1194-96, 3761-3816. A few hours later, Capellini rescanned the response, including a copy of the Remaro S-1 that did not contain the footer. RP 1199, 3817-3888. During its investigation, FMC located in Capellini's office the

hard copy of the Remaro S-1 with the footer cut off in the file for the Remaro Request.[9] RP 3516-3565, 3731-33, 3745-3888,

Capellini's primary argument on appeal is that the Lazex and Remaro Requests were ambiguous.[10] But the requests were clear—they specifically asked for "[c]opies of all due diligence inquiries that the firm made to determine the free trading basis" of the stocks.[11] *See Dep't of Enf't v. Palmeri*, Complaint 2007010580702, 2013 FINRA Discip. LEXIS 2, at *15 (FINRA NAC Feb. 15, 2013) (rejecting a respondent's interpretation of a request for information when the request was clear and unambiguous). The request did not ask Capellini to obtain documents from her husband or any third party. Rather, the very nature of the request itself—

[9] Capellini argues that the NAC improperly shifted the burden to Capellini to explain the altered Remaro S-1. Br. at 26. Capellini is mistaken. The NAC found that the circumstantial evidence demonstrated persuasively that Capellini altered the document to remove the date it was downloaded.

[10] Capellini argues that the NAC's dismissal of findings of violation with respect to the Rivex Request itself proves that the requests are ambiguous. Capellini ignores, however, the important fact that the Rivex Request was worded differently, and that the NAC found it could be understood to request more than due diligence under the circumstances of this case.

[11] The only case Capellini cites, *Dep't of Enf't v. Blake*, Expedited Proceeding No. FPI180004, 2018 FINRA Discip. LEXIS 30 (FINRA OHO Oct. 29, 2018), is distinguishable. In *Blake*, the Hearing Officer found that the relevant Rule 8210 request was ambiguous because it referred to allegations that were not "define[d] or describe[d]" in the request. *Id.* at *13-14. Instead, the request referred to "allegations" contained in a separate document that was not provided to the respondent. *Id.* Here, the Lazex and Remaro Requests specifically asked Capellini to provide the due diligence the firm had done to determine the free-trading basis of the stocks. Capellini did not need to consult any source or documents outside the request to understand it. Her argument that this request was ambiguous to a compliance professional with almost four decades of experience defies credulity.

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seeking the *firm's* due diligence—demonstrates that FINRA was not asking Capellini to obtain responsive documents from anyone outside the firm.[12]

The record therefore supports the NAC's findings that Capellini violated FINRA Rules 8210 and 2010, and the Commission should sustain these findings.

C. The Sanctions Imposed by the NAC Are Supported by the Evidence, Consistent with the Sanction Guidelines, and Neither Excessive nor Oppressive

Under Exchange Act Section 19(e)(2), the Commission will sustain the sanctions FINRA imposes unless they are "excessive or oppressive" or impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e)(2). In evaluating the sanctions FINRA imposed, the Commission considers any aggravating or mitigating factors, and whether the sanctions are remedial and not punitive. *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). When so doing, the Commission considers FINRA's Sanction Guidelines (the "Guidelines") as a benchmark.[13] *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *34 n.85 (Nov. 9, 2012).

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[12] Capellini cites a Hearing Panel case, *Dep't of Enf't v. Dreamfunded Marketplace, LLC*, Complaint No. 2017053428201, 2019 FINRA Discip. LEXIS 27 (FINRA OHO June 5, 2019), *appeal docketed*, SEC Admin. Proceeding No. 3-20639 (Oct. 28, 2021), to make the baseless argument that she would have violated FINRA Rule 8210 by *not* obtaining responsive documents from her husband. But *Dreamfunded* involved requests for the respondents' bank statements, copies of which could be obtained from the respondents' banks. *Id.* at *243-47. Here, the requests were for due diligence conducted by the firm to determine the free trading status of the stocks—documents that by definition should have come from FMC's files. Moreover, if Capellini did want to provide additional documents from her husband's records that were not responsive to FINRA's requests, she could have produced them. She simply needed to disclose to FINRA that the documents came from her husband and were not part of FMC's due diligence.

[13] *FINRA Sanction Guidelines* (March 2024), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

The NAC imposed a bar for Capellini's violations of FINRA Rule 3310(a) and 2010, and a second, independent bar for her violations of FINRA Rules 8210 and 2010. These sanctions are consistent with the Guidelines, supported by the presence of numerous aggravating factors and the absence of any mitigating factors, and meet the standards of Exchange Act Section 19(e)(2).

1. A Bar Is Appropriate for Capellini's Egregious AML Violations

The Guidelines for violations of FINRA Rule 3310(a) provide for a suspension in all capacities of two months to two years or barring the respondent when aggravating factors predominate. Guidelines at 83. The relevant principal considerations include: (1) whether the respondent failed to detect or investigate "red flags" of suspicious activity; (2) whether the deficiencies in the suspicious transaction monitoring allowed reportable activity to escape detection; (3) whether the respondent's failures were systemic, widespread, or occurred over an extended period; and (4) whether the respondent was responsible for establishing the firm's AML compliance program. *Id.* The NAC properly found three of these four factors aggravating. As AMLCO, Capellini was responsible for establishing and implementing FMC's AML compliance program. She failed both to implement procedures tailored to FMC's LPS business and to detect or investigate numerous red flags of suspicious activity in her husband's accounts. Capellini's violations were systemic—they encompassed all LPS trading at the firm—and lasted for two and a half years, until she was dismissed by FMC.

Several of the Principal Considerations in Determining Sanctions (the "Principal Considerations") also apply and are aggravating. Guidelines at 7-8. Capellini's misconduct was, at a minimum, reckless. *Id.* at 8 (Principal Consideration No. 13). While she was provided with FINRA AML guidance shortly before she revised FMC's AML procedures, there is no evidence

that she did anything to incorporate that guidance into the procedures. In early 2019, FMC's auditors also recommended several improvements to its procedures, including customizing the software provided by Pershing to create useful alerts and exception reports, implementing "specific procedures . . . for monitoring for suspicious activities, reviewing red flags and escalating any findings and taking additional actions in those circumstances," and performing periodic testing of the AML procedures to determine their effectiveness. RP 6430. The auditors further noted that FMC "must understand" how its reliance on Pershing impacted its independent AML obligations, including "describing the exception reports, if any, [the firm] obtain[s] from [its] clearing firm, how frequently the reports will be reviewed and by whom, what review or inquiry will be conducted regarding exceptions, and how that review will be evidenced." RP 6435. When the auditors returned the next year, their report noted that FMC had not implemented any of these recommendations. RP 6446-52.

Capellini's recklessness was also evident in her failure to properly use the single due diligence tool FMC had adopted—the Preclearance Form she herself helped develop. In certain instances, Capellini did not complete a Preclearance Form for a deposit at all or completed it after the deposit. RP 3415. And while the form itself stated that it was to be used for sales of LPS, Capellini did not complete a Preclearance Form and admitted she conducted no AML review at all for any LPS sales. Moreover, when she did complete a Preclearance Form, she included minimal information and, when shares were acquired in a sale, did nothing to learn about the relationship of the seller to the issuer.

Particularly aggravating is the potential financial gain to Capellini resulting from her husband's trading in accounts for which she conducted deficient AML review. Guidelines at 8 (Principal Consideration No. 16). As the NAC noted, the frequency of Bendelac's deposits and

sales of LPS increased significantly after Capellini became AMLCO. Capellini did virtually no AML compliance review of these transactions, which generated more than $360,000 in the Aleutian account and almost $400,0000 in all Bendelac's accounts. RP 3405. Capellini admitted that these gains were used to pay for her household expenses. RP 2555. These financial gains combined with the conflict of interests inherent in Capellini's AML supervision of her husband's accounts justify a bar.

Capellini's claim that a bar is excessive as compared to other cases is without merit. Br. at 28. It is well-settled that sanctions in FINRA disciplinary proceedings are determined based on the facts and circumstances present in the case and not by comparison to other cases. *See Michael Davis Borth*, 51 S.E.C. 178, 182 (1992) (explaining that sanctions depend on the facts and circumstances of the case and cannot be determined by comparison to other cases).

Capellini's other arguments in favor of mitigation are similarly unavailing. Capellini argues that she did not conceal her deficient review of LPS deposits because, when she was asked which documents she obtained from her husband during on-the-record testimony, she was candid. Br. at 30. But Capellini's candor came after FMC's had discovered her misconduct and reported it to FINRA. Her admissions after getting caught are not mitigating. *See* Guidelines at 7 (providing mitigation when an individual acknowledges misconduct *before* detection). Capellini's claim that a lack of customer harm is mitigating also has no merit. Br. at 30. *See Southeast Inv., Inc.*, Exchange Act Release No. 99118, 2023 SEC LEXIS 3460, at *35 (Dec. 7, 2023) (explaining that a lack of customer harm is not mitigating), *aff'd sub nom., Black v. SEC*, 125 F.4th 541 (4th Cir. 2025). Finally, Capellini argues that she should be given mitigation in the form of credit for the fact that FMC dismissed her, and because she is no longer associated with a FINRA member and does not intend to reassociate with one. Br. at 30. Capellini's

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present intention not to reassociate with a FINRA member is not relevant to whether termination is mitigating. Absent a bar Capellini can reassociate with a FINRA member, and she has not met her burden of showing that her dismissal by the firm "has materially reduced the likelihood of future misconduct" should she do so. *See Dep't of Enf't v. Makkai*, Complaint No. 2018058924502, 2023 FINRA Discip. LEXIS 2, at *22 (FINRA NAC Jan. 6, 2023) ("termination by a member [is] mitigating when a respondent has expressed true remorse and made credible assurances against future misconduct"). Capellini has not taken responsibility for her misconduct, and she persists in blaming others for her misconduct.

The sanction of a bar for Capellini's near-complete abdication of her responsibilities as AMLCO with respect to LPS trading at FMC is well supported by the evidence, consistent with the Guidelines, and appropriately remedial given the presence of numerous aggravating and no mitigating factors.

2. A Bar Is Appropriate for Capellini's Rule 8210 Violations

The Guidelines for a failure to respond, respond truthfully, or partially responding to a FINRA Rule 8210 request provide that, where the respondent provided a partial response, a bar is standard unless the respondent has substantially complied with the request. Guidelines at 93. The sanction of a bar reflects the critical importance of FINRA Rule 8210 to FINRA's ability to conduct investigations, and the damage incomplete or untruthful responses can do to those investigations. *See, e.g.*, *Michael A. Rooms*, 58 S.E.C. 220, 229 (2005) (explaining that untruthful responses "are more damaging than a refusal to respond to a request for information since they mislead [FINRA] and can conceal wrongdoing"), *aff'd*, 444 F.3d 1208 (10th Cir. 2006); *Dep't of Enf't v. Mellon*, Complaint No. 2017052760001, 2022 FINRA Discip. LEXIS 11, at *30-31 (FINRA NAC Oct. 18, 2022) (imposing a bar for a failure to respond truthfully).

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The primary consideration is assessing sanctions in the importance of the requested information to FINRA. Guidelines at 93.

Capellini violated FINRA Rule 8210 by producing in response to requests for documents from FMC's due diligence files documents that she obtained from her husband *after* FINRA issued the requests. By not disclosing this fact to FINRA—and by altering a document to remove the date it was downloaded—Capellini misled FINRA about the true extent of the firm's due diligence. While it is true that OFDMI's investigation was focused on the trading in Lazex and Remaro, this does not excuse Capellini's misleading responses. As the OFDMI director testified, the requests sought the firm's due diligence, and if problems with the firm's due diligence had been detected, OFDMI could have referred the matter to Enforcement for further investigation. RP 1383-43. Thus, the requests and Capellini's responses were important to FINRA.

Capellini's false and misleading responses support the bar FINRA imposed on her. *See, e.g., Trevor Michael Saliba*, Exchange Act Release No. 99940, 2024 SEC LEXIS 852, at *16-20 (Apr. 11, 2024) (sustaining a bar for providing false and misleading information to FINRA); *Rita Delaney*, 48 S.E.C. 886, 890 (1987) (affirming bar when applicant falsified firm records to conceal activities from FINRA during its investigation and stating that "[i]n a business that depends so heavily on the integrity of its participants, such behavior cannot be countenanced").

The Guidelines and applicable aggravating factors demonstrate that a bar is the appropriate sanction for Capellini's Rule 8210 violations and the Commission should sustain it.

D. FINRA Timely Commenced Disciplinary Proceedings Against Capellini

Capellini argues that FINRA lacked jurisdiction over her when it filed the complaint initiating disciplinary proceedings. Br. at 9-22. In this regard, Capellini argues that the two-year

period during which FINRA retained jurisdiction to discipline her began running on May 8, 2020, when FMC told FINRA staff that it had fired Capellini. Br. at 9. Capellini misunderstands the applicable rules and ignores relevant precedent.

Article V, Section 4(a)(i) of FINRA's By-laws provides that FINRA retains jurisdiction over a formerly registered person for "two years after the effective date of *termination of registration* pursuant to Section 3" of the By-laws. (Emphasis added.) When a FINRA member terminates its association with a registered person, Article V, Section 3 requires the member to give FINRA notice "not later than 30 days after such termination . . . via electronic process or such other process as [FINRA] may prescribe on a form designated by [FINRA]." For termination of registration, FINRA has long designated the electronic filing of a Form U5 to the Central Registration Depository ("CRD"®). *See* FINRA Rule 1010(a) and (e) (requiring initial filings and amendments of the Form U5 to be submitted electronically).

The Commission has held that the two-year period of FINRA's retained jurisdiction runs from the date that a registered person's registration—not employment—is terminated by the filing of a Form U5. *See, e.g., David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *11-12 (July 27, 2015). Here, the parties stipulated that the Form U5 terminating Capellini's registration was filed on June 5, 2020.[14] Thus, the June 1, 2022 complaint was filed timely during the two-year retention of jurisdiction.

Capellini relies on a strained and novel reading of Article V, Section 3(a) to argue that it provides two ways to terminate registration—either "via an electronic process" or through "such

[14] Capellini's claims about the dates reflected in her CRD record ignores this stipulation and the section of CRD that reflects that FINRA terminated her registration on June 5, 2020. RP 6477.

other process as [FINRA] may prescribe on a form designated by [FINRA]." Br. at 18. As the Commission has explained, however, "FINRA is in charge of its own registration system and requires filings from its members, including on Forms U5, to administer registration changes and the consequences that flow from changes in registration status." *Evansen*, 2015 SEC LEXIS 3080, at *12-13. Accordingly, a "registered person cannot unilaterally terminate his or her FINRA registration before FINRA *receives the prescribed form*" and she "remains registered until *FINRA* (*not the registered person*) ends the registration, based, among other things, on the Forms U5 it receives." *Id.* at *13 (emphasis added). As the Commission has stated "the two-year [retained jurisdictional] window opens when FINRA terminates the registration, and FINRA must be able to rely on its receipt of notices to set a date certain for terminating registration." *Id.*; *see also* FINRA Bylaws, Art. V, Sec. 3(a) (stating that FINRA "may in its discretion declare the termination [of registration] effective at any time."). Capellini's reading contravenes these principles and ignores that FINRA has designated the electronic filing of the Form U5 as the method for terminating registration. *See* FINRA Rule 1010(e).[15]

Capellini argues that her reading of Article V, Section 3(a) is consistent with the purposes of retained jurisdiction because it gives FINRA ample time to conduct its investigation into possible rules violations. Br. at 20. Capellini ignores, however, that such a reading of the rules, in addition to being contrary to the language of the By-Laws, FINRA Rule 1010, and Commission case law, would undermine the certainty and ease of administration of the current rules. The Commission should therefore reject Capellini's jurisdiction argument.

[15] Capellini's argument also ignores that FINRA Rule 1010(a) requires that the Form U5 and similar registration forms must be filed "to the CRD." Neither the firm's email nor the Webex invitation was a filing to the CRD. Moreover, FINRA has never "prescribed" such communications as methods of terminating registration.

E. Capellini's Constitutional Challenges Lack Merit

FINRA is a private, self-regulatory organization ("SRO"). It is not part of the Government or a state actor such that it is subject to Constitutional requirements. Capellini fails to address controlling precedent governing when a private entity may be subject to constitutional requirements, conflates constitutional principles, and misinterprets Supreme Court jurisprudence. Because Capellini has not met the exacting criteria necessary to establish that FINRA, a private entity, is in fact part of the Government for constitutional purposes or is otherwise engaged in state action triggering constitutional requirements, Capellini's arguments that FINRA's process violated Article II or the Seventh Amendment of the Constitution have no merit. Nor has Capellini established a violation of the private nondelegation doctrine.[16]

1. FINRA Is a Private Entity, and Its Hearing Officers are Not Subject to Constitutional Appointment and Removal Requirements

Capellini challenges FINRA's "structure, procedures and exercise of enforcement authority" over her because its hearing officers are neither appointed nor removable in accordance with Article II of the Constitution. Br. at 15. This argument is without merit because constitutional appointment and removal requirements do not apply to employees of a private SRO like FINRA.[17]

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[16] Capellini raised her constitutional claims for the first time in this appeal before the Commission. The record demonstrates that Capellini did not raise any constitutional argument in her answer, during the hearing, or on appeal to the NAC. RP 333-350, 6531-6566, 6901-6930. Thus, Capellini failed to exhaust and forfeited these claims. *See Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *39-42 (Apr. 3, 2020) (finding that applicant forfeited constitutional claims by failing to raise them before FINRA).

[17] FINRA is a private, self-regulatory organization and registered national securities association under the Exchange Act. *Black v. SEC*, 125 F.4th 541, 543 (4th Cir. 2025).

The Appointments Clause applies to "Officers of the United States" holding principal offices "established by Law." U.S. Const. Art. II, § 2, cl. 2. The Constitution's removal powers are limited likewise to "executive officers," whom the President is "empower[ed] . . . to keep accountable[] by removing them from office." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). Constitutional appointment and removal requirements therefore apply only to "'Officers of the United States,' *a class of government officials*" employed by the federal government. *Lucia v. SEC*, 585 U.S. 237, 241 (2018) (emphasis added); *accord Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) (en banc) ("Supreme Court precedent has established that the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government.").

Capellini cannot establish that FINRA is part of the "Government itself" for constitutional purposes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). Under the strict framework established in *Lebron*, a private entity is part of the "Government itself" only when the Government "creates [the] corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation." *Id.* at 400. FINRA, however, does not possess any of those unique, governmental characteristics; the Government did not create FINRA; FINRA does not receive government funding; and the Government does not appoint any members of FINRA's board. *See Kim v. FINRA*, 698 F. Supp. 3d 147, 157-58, 162 (D.D.C. 2023); *see also Newport Coast*, 2020 SEC LEXIS 911, at *44-45 ("FINRA is a private entity: It operates as a private, Delaware non-profit corporation; it receives no funding from the government; and the positions within it are not created by federal law.").

Capellini does not acknowledge, let alone attempt to surmount, *Lebron's* "insuperable hurdle." *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* ("*Horsemen's II*"), 107 F.4th 415, 439 (5th Cir. 2024). Instead, Capellini attempts to draw parallels to the Supreme Court's opinions in *Lucia* and *Freytag v. Comm'r*, 501 U.S. 868 (1991), to argue that FINRA and its hearing officers are part of the Government for Article II purposes. Br. at 15-16. FINRA hearing officers, however, are employees of FINRA, a private entity, and are thus readily distinguishable from the judges at issue in *Lucia* and *Freytag*, who were unquestionably federal Government personnel.[18] *See Lucia*, 585 U.S. at 244 ("The sole question here is whether the Commission's ALJs are 'Officers of the United States' or simply employees of the Federal Government."); *Freytag*, 501 U.S. at 880 ("If we . . . conclude that a special trial judge is only an employee, petitioners' challenge fails, for such 'lesser functionaries' need not be selected in compliance with the strict requirements of Article II."). *Lebron*—rather than *Lucia* or *Freytag*—supplies the appropriate standard for evaluating Capellini's Article II claims concerning FINRA and its hearing officers, and she fails to satisfy that standard.[19] *See Horsemen's II*, 107 F.4th at

[18] Capellini's comparison, Br. at 16, of the duties and powers of FINRA hearing officers to those of the judges at issue in *Lucia* and *Freytag*, is irrelevant. The activities that Capellini equates with the exercise of federal Government power refers simply to the powers that FINRA hearing officers possess to regulate FINRA's internal disciplinary proceedings under its Code of Procedure. "They are not [] authority bestowed by the federal government." *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1328 (D.C. Cir. 2024).

[19] Ostensibly quoting *Freytag*, Br. at 16, Capellini identifies one who exercises "significant authority" under federal law as the "marker[]" or "hallmark" of an Officer of the United States under Article II of the Constitution. Further review of *Freytag*, however, indicates that the phrase "significant authority" is in fact drawn from *Buckley v. Valeo*. *See Freytag*, 501 U.S. at 882. *Buckley* predicated application of Article II on the condition that an "Officer of the United States" must first be a federally employed Government official. *See* 424 U.S. at 125-26 (defining "Officers of the United States" to include "all persons who can be said to hold an office under the government"). Courts have expressly rejected efforts to extend *Buckley* to private entities in the manner Capellini proposes. *See Horsemen's II*, 107 F.4th at 439 (declining to extend *Buckley* "beyond [its] facts to analyze whether persons in a *private* entity are 'Officers.'").

439 ("*Lebron* addressed when a private entity qualifies as part of the government for constitutional purposes. . . . We are not at liberty to displace the Supreme Court's governing framework.").

"FINRA does not exercise federal executive power." *Mission Sec., Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *39 (Dec. 7, 2010). FINRA is instead registered under, and operates subject to, Section 15A of the Exchange Act, 15 U.S.C. § 78o-3, which the Supreme Court has noted, "supplements the [S]ecurities and Exchange Commission's regulation of the over-the-counter markets by providing a system of cooperative self-regulation." *United States v. NASD*, 422 U.S. 694, 700 n.6 (1975). Although Section 15A authorizes the SEC to exercise a "significant oversight function" over registered securities associations, *id.*, SROs, such as FINRA, are not "Government-created, Government-appointed entit[ies]." *Free Enter. Fund*, 561 U.S. 484-85 (distinguishing between "*private* self-regulatory organizations in the securities industry," like FINRA on one hand, and the Public Company Accounting Oversight Board, on the other (emphasis added)). Accordingly, FINRA's privately-employed hearing officers are *not* "Officers of the United States" subject to the Constitution's Appointments Clause or removal requirements. *See Newport Coast*, 2020 SEC LEXIS 911, at *43-44 ("Because FINRA is 'not part of the Government itself' for constitutional purposes, FINRA employees cannot be 'officers *of the United States*' for purposes of the Appointments Clause." (emphasis in original)); *see also Kim*, 698 F. Supp. 3d at 163 (finding it unlikely that FINRA hearing officers are "employees of a federal [G]overnment entity or instrumentality in the first instance" for purposes of plaintiff's

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Article II claims). Capellini's Article II challenges to FINRA and its hearing officers consequently fail.[20]

2. FINRA Disciplinary Proceedings Do Not Implicate the Seventh Amendment

Capellini, citing *SEC v. Jarkesy,* 603 U.S. 109 (2024), argues that FINRA's disciplinary proceeding violated her Seventh Amendment right to a jury trial. Br. at 11. Capellini's Seventh Amendment argument fails for several reasons.

First, Capellini's argument fails because she has not shown that FINRA is a state actor. To establish that FINRA violated her Seventh Amendment right to a jury trial, Capellini must, as "a threshold requirement," demonstrate "that in denying [her] constitutional rights, [FINRA's] conduct constituted state action." *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999); s*ee also Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019) ("In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities."). FINRA is a private SRO, and Capellini has not shown that FINRA's disciplinary action is one of the "few limited circumstances," *Halleck,* 587 U.S. at 809, in which a private entity's conduct is "fairly attributable to" the government and thus constitutes state action subject to constitutional requirements, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Because "frontline authority over broker-dealers has fallen to *private*

[20] Contrary to Capellini's assertion, Br. at 17, the state-action doctrine has *no* relevance to the applicability of the Constitution's structural provisions, like the appointment and removal requirements of Article II. *See Lebron*, 513 U.S. at 378 (explaining that whether the "private action" of a "private entity" can "be deemed that of the state" for purposes of adjudicating individual constitutional rights is a separate question than whether an entity is part of the "Government itself"); *Kim*, 698 F. Supp. 3d at 163-164 & n.12 ("[T]he state action theory does not apply to Plaintiff's Article II Appointments Clause or removal power claims."). And as discussed below, *infra* part IV.E.2, FINRA does not engage in state action when it disciplines its members and persons associated with its members.

entities and *not* the state," FINRA's private-self regulatory responsibilities are private conduct, not state action. *Kim*, 698 F. Supp. 3d at 164. Courts and the Commission have rejected repeatedly the argument that FINRA engages in state action when it carries out its regulatory responsibilities under the Exchange Act. *See, e.g.*, *Desiderio*, 191 F.3d at 206 (rejecting plaintiff's Seventh Amendment and due process claims after finding "NASD is a private actor, not a state actor"); *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *13 (Nov. 8, 2007) ("Fawcett's position [that the NASD is a state actor] . . . is directly contrary to established precedent."); *Mark H. Love*, 57 S.E.C. 315, 322 n.13 (2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements."). Capellini's Seventh Amendment argument is thus meritless.[21]

Capellini argues that FINRA acted as an "agent" of and was "entwined" with the Commission when FINRA issued information requests to FMC and proceeded to discipline Capellini for providing false and misleading responses to those requests. Br. at 17. The evidentiary hurdle that Capellini must surmount to demonstrate that FINRA's actions in this case amounted to state action is "high." *See Michael Sassano*, Exchange Act Release No. 58632, 2008 SEC LEXIS 2947, at *34 (Sept. 24, 2008). Capellini must present a specific and "close nexus" between the actions of FINRA and the Commission to trigger the constitutional

[21] Capellini purports to reserve for argument "on further appeal" that FNRA's disciplinary proceeding violated her due process rights. Br. at 18 n.87. This claim, because it lacks development, does not preserve any issue for appeal. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). In any event, as is the case with Capellini's Seventh Amendment argument, the requirements of the Constitution's Due Process clause do not apply to FINRA disciplinary proceedings because FINRA is a private actor. *See, e.g.*, *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the NASD, because '[t]he NASD is a private actor, not a state actor.").

protections she invokes. *See id.* at *16, 18 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295 (2001)). The "corroboration" that Capellini asserts to prove that FINRA and the Commission "coordinated" their efforts, Br. at 17, is unpersuasive. Facts generally indicating cooperation or information sharing between FINRA and the Commission are, standing alone, insufficient to establish state action. *See Sassano*, 2008 SEC LEXIS 2947, at *19. That the Commission pursued its own investigation of the facts surrounding Capellini's responses to FINRA's information requests, and later brought an independent action against her husband, Br. at 17-18, proves nothing. *See Warren E. Turk*, Exchange Act Release No. 55942, 2007 SEC LEXIS 1355, at *18 (June 22, 2007) (concluding evidence there was a temporal connection between NYSE and Commission requests for an individual's testimony, and that both regulators later brought charges in connection with their respective investigations, was insufficient to establish state action); *see also Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (evidence that NASD shared information with a district attorney's office, and that such information led to a criminal prosecution, did not establish that NASD's conduct was state action). That representatives of FINRA and the Commission (and the Department of Justice) participated on a call that FMC's outside counsel initiated, RP 5309, is likewise insufficient to establish state action. *See Sassano*, 2008 SEC LEXIS 2947, at *30 ("The evidence indicates that the joint participation at the proffer actually occurred at Sassano's counsel's suggestion, not as a result of any [Commission] guidance of or control over the NYSE Enforcement investigation."). To prevail on her claim of state action, Capellini must establish additional facts to distinguish the circumstances of her appeal from the general rule that FINRA is *not* a state actor when it fulfills its regulatory responsibilities. *See D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002). Capellini, however, does not present *any* facts

showing a "kind or degree of cooperation or interaction" between FINRA and the Commission necessary to support her argument that FINRA engaged in state action in this case. *See Fawcett*, 2007 SEC LEXIS 2598, at *16-17 (facts that bear on an attribution of state action include "whether the challenged activity 'results from the State's exercise of its coercive power'; whether 'the State provides significant encouragement, either overt or covert'; or whether a 'private actor operates as a willful participant in the joint activity with the state or its agents'" (quoting *Brentwood Acad.*, 531 U.S. at 296)). Accordingly, Capellini's claim of state action fails.

Second, *Jarkesy* has no bearing on FINRA or its disciplinary action against Capellini. In *Jarkesy*, the Supreme Court made clear that the issues it confronted concerned "the basic concept of separation of powers that flow from the scheme of a tripartite government" and the ability of Congress to "withdraw from judicial cognizance" a matter that was the subject of a "suit at common law" at the time of the Founding under the Seventh Amendment. *Jarkesy*, 603 U.S. at 127 (internal quotation marks omitted). Capellini does not explain how the separation-of-powers principles regarding the exercise of the "judicial Power of the United States," U.S. Const. Art. III, § 1, apply to a private SROs like FINRA.

Nor is FINRA's disciplinary action against Capellini a "suit at common law" that must be tried in an Article III court.[22] *See Daniel Turov*, 51 S.E.C. 235, 238 (1992) (holding that an SRO

[22] FINRA disciplinary actions, including this one, are founded on allegations that a respondent violated FINRA Rule 2010, which requires that FINRA members and associated persons, "in the conduct of [their] business," "observe high standards of commercial honor and just and equitable principles of trade." This rule fulfills FINRA's mission to "protect investors and the public interest." *See* 15 U.S.C. § 78o-3(b)(6); *see also Valley Forge Sec. Co.*, 41 S.E.C. 486, 490 (1963). It allows FINRA to discipline members and associated persons for any business-related conduct that is unethical. *See Valley Forg*e, 41 S.E.C. at 490. Those under FINRA's jurisdiction who violate the securities laws or rules are subject to discipline for an

[Footnote continued on next page]

disciplinary proceeding is not a suit at common law for purposes of the Seventh Amendment and "[t]he guarantees pertaining to trials by jury . . . are therefore inapposite"). The hallmark the Supreme Court has looked to in determining whether a matter is a suit at common law is whether it is "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Jarkesy*, 603 U.S. at 127-28 (*quoting Stern v. Marshall*, 564 U.S. 462, 484 (2011)) (internal quotation marks omitted). The self-regulatory mechanisms of the securities industry, which has involved private investigation and adjudication of broker conduct since the 1790s, has never been "the stuff of the traditional actions at common law." *Id*. at 128. Rather, they have been "the stuff of" private self-regulation of the securities industry pursuant to privately developed and implemented procedures—a system that Congress embraced in the 1930s with the passage of the Exchange Act and has reaffirmed numerous times since.[23]

Finally, Capellini's Seventh Amendment argument fails because by associating with a FINRA member, Capellini submitted to FINRA's jurisdiction and rules, including its

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ethical violation under FINRA Rule 2010. *See All. for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2024 U.S. App. LEXIS 31475, at *38 (5th Cir. Dec. 11, 2024) (stating that "SROs have frequently applied [FINRA Rule 2010 and similar rules] to discipline [their] members for conduct that is unethical, such as[] violating the securities laws"). Accordingly, a FINRA disciplinary proceeding is, at its core, an ethical proceeding. *See Jones v. SEC*, 115 F.3d 1173, 1179 (4th Cir. 1997) ("The major issues in [FINRA] disciplinary proceedings are whether a member or registered representative violated [just and equitable principles of trade]."). Imposing discipline for a violation of the ethical norms of the securities industry, a quintessentially self-regulatory act, is neither "the stuff of" a suit at common law nor an action in equity requiring adjudication in an Article III court. See *All. for Fair Bd. Recruitment*, 2024 U.S. App. LEXIS 31475, at *37 ("[T]he J&E provision simply requires [self-regulatory organizations] to promote behavior that is morally right and in conformity with the rules and customs of the securities profession."); *cf. In re Clark*, 678 F. Supp. 3d 112, 122 (D.D.C. 2023) (attorney disciplinary proceedings are not "of a character traditionally cognizable by courts of common law or of equity") (collecting cases).

[23] "[T]he securities industry in the United States has engaged in extensive self-regulation for more than two centuries." *Alpine*, 121 F.4th at 1319-21 (discussing "[b]y way of background," the history of the securities industry's self-regulation).

disciplinary procedures, and thus waived any right she might otherwise have had to a jury trial.[24] *See CFTC v. Schor*, 478 U.S. 833, 848-50 (1986) (finding that Article III and jury-trial rights are "subject to waiver, just as are other personal constitutional rights"); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (rejecting Article III challenge to regulatory scheme in which each participant "explicitly consents to have his rights determined by arbitration").

Associated persons registered with FINRA affirmatively agree to abide by its rules, including the Commission-approved rules that govern FINRA disciplinary proceedings. *See* FINRA By-Laws Article V, Section 2(a)(1) (requiring that an application by any person for registration with FINRA contain an "agreement to comply" with the federal securities laws, the rules and regulations thereunder, MSRB and FINRA rules, "and all rulings, orders, directions, and decisions issued and sanctions imposed under [FINRA rules]"). Accordingly, when Capellini applied for FINRA registration, she knowingly relinquished any rights she might otherwise have had to defend FINRA disciplinary charges before a jury in an Article III court. *See Schor*, 478 U.S. at 850.

3. FINRA Functions Subordinately to the Commission in Satisfaction of Private Nondelegation Principles

Capellini's claim that FINRA's disciplinary action "contravened the private nondelegation doctrine" also fails.[25] Br. at 13. Congress may permissibly give a private entity a role in a regulatory program if it "function[s] subordinately" to and is under the "authority and

[24] Capellini concedes that she agreed to abide by FINRA's rules when she applied for registration with FINRA. Br. at 20 n.93.

[25] Capellini's private nondelegation argument undercuts her assertion that FINRA and its hearing officers are subject to the requirements of Article II of the Constitution. *See Alpine*, 121 F. 4th at 1336 ("Alpine's private nondelegation argument suggests[] FINRA is not a government agency.")

surveillance" of a governmental body. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). A government agency properly "retains final reviewing authority" over the private entity if the agency "'independently perform[s] its reviewing, analytical and judgmental functions.'" *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021), *cert. denied sub nom. Texas v. Comm'r*, 142 S. Ct. 1308 (2022).

FINRA does not, when it disciplines its members and their associated persons using processes providing the opportunity for a hearing and appeals, exercise regulatory power that is beyond the Commission's comprehensive oversight. "[T]he [Commission] has 'pervasive oversight authority' over [FINRA's] disciplinary proceedings to ensure that they are conducted fairly." *Jones*, 115 F.3d at 1182. Moreover, as the Fifth Circuit reiterated recently, the Commission has "formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps." *Horsemen's II*, 107 F. 4th at 434 (quoting *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007)).

The Commission must approve FINRA rules, and "may abrogate, add to, and delete from all FINRA rules as it deems necessary." *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013) (citing 15 U.S.C. § 78s(b)(1), (c)). The Commission also regularly examines FINRA to ensure its compliance with securities laws and FINRA rules. *See, e.g., U.S. Gov't Accountability Off., GAO-18-522, SEC Inspections of FINRA's Governance Were Consistent with Internal Guidance* (2018), https://www.gao.gov/products/gao-18-522. FINRA must notify the Commission of any final disciplinary action against a member, which is thereafter subject to de novo review by the

Commission acting sua sponte, or in response to a petition from the aggrieved party.[26] *See* 15 U.S.C. § 78s(d)(1)-(2), (e).

The Commission's extensive oversight properly cabins FINRA's authority to discipline its members and their associated persons to a constitutionally permissible role. FINRA's subordinate regulatory role to the Commission is why, "in case after case, the courts have upheld this arrangement," reasoning that the [Commission's] ultimate control over the rules and their enforcement makes [FINRA] [a] permissible aide[] and advisor[]." *Oklahoma v. United States*, 62 F. 4th 221, 229 (6th Cir. 2023); *accord Kim*, 698 F. Supp. 3d at 166 ("Plaintiff's private nondelegation challenge likely fails because FINRA 'function[s] subordinately' to the [Commission], which has 'authority and surveillance over [FINRA's] activities.'" (quoting *Adkins*, 310 U.S. at 399)). Capellini offers no grounds to depart from authority that squarely rejects her nondelegation claim.[27]

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[26] FINRA's Commission-approved rules establish a "multi-layered hearing and appeals process" that governs its disciplinary proceedings. *Turbeville v. FINRA*, 874 F.3d 1268, 1271 (11th Cir. 2017). These rules, and the Exchange Act, generally provide respondents multiple procedural safeguards, including the opportunity for: (1) an evidentiary hearing before a three-person panel during which respondents have the right to present evidence and witness testimony, FINRA Rules 9231-9234, 9261; (2) an appeal to the NAC, during which any sanction, including a bar or expulsion, is stayed, FINRA Rule 9311; (3) a subsequent de novo appeal to the Commission, 15 U.S.C. § 78s(d)(1)-(2), (e); and (4) a petition for review to a designated U.S. Court of Appeals, *id.* § 78(y)(a)(1).

[27] In *Alpine*, the court partially reversed a district court's denial of a preliminary injunction, and it instructed the district court on remand to enjoin FINRA from expelling the plaintiff until after the Commission reviewed the merits of any expulsion order that may be issued in an expedited proceeding, or until the time for the plaintiff to seek Commission review has elapsed. *See* 121 F. 4th at 1330. The court held, as a "preliminary" matter on "the early record," that the plaintiff demonstrated a "likelihood of success" in establishing that the private nondelegation doctrine prevents FINRA from expelling the plaintiff "with no opportunity for SEC review," but it rejected the plaintiff's broader attempt to halt the expedited proceeding. *See id*. at 1319. The court stressed, however, that its "opinion is narrow" and "limited to expedited expulsion proceedings," which "function[] differently" from "many" other FINRA proceedings that are

[Footnote continued on next page]

V. CONCLUSION

The record establishes that Capellini failed to establish and implement an AML program reasonably designed to cause the detection and reporting of suspicious LPS transactions and failed to detect or reasonably investigate red flags of suspicious activity in accounts controlled by her spouse. Capellini also violated FINRA Rule 8210 by providing false and misleading responses to requests for the firm's due diligence with respect to the deposits into her husband's account. Capellini's serious misconduct and the many applicable aggravating factors demonstrate that bars for her violations are appropriately remedial. The Commission should sustain FINRA's action in all respects.

Respectfully submitted,

[redacted]

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"unlikely to violate the Constitution because [Commission] review can take place after FINRA's sanctions take effect." *Id.* at 1326, 1330-31. The court notably highlighted one specific limit on its opinion that is relevant here: barring an individual from associating with a FINRA member "may be meaningfully different" from an expulsion of a firm from FINRA membership. *Id.* at 1331 & n.3.

OS Received 03/03/2025

CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c), as extended by the Commission February 20, 2025 order. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 15,352 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

I further certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further certify that on this 3rd day of March 2025, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, in the matter of the Application for Review of Suzanne Marie Capellini, Administrative Proceeding File No. 3-22284, to be filed through the SEC's eFAP system.

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